I hold, therefore, that the act of bankruptcy was founded on a document issued without the authority or cognizance of the respondent. The petition against him for a Receiving Order and an Adjudication Order must accordingly be dismissed with costs.

Order accordingly.

Solicitors: *S. Thillaimuthu; Pillai, Lim, Lee & Hwang.*

LEE AH CHEONG v. REG.

[C.C.A. (Whyatt C.J., Tan Ah Tah and Wee Chong Jin JJ.) May 21, 1958]

[Singapore — Criminal Appeal No. 1 of 1958]

Criminal Law and Procedure — Jury — Special jury — Summoning of, without Judge's order — Criminal Procedure Code (Cap.132), s.180 — Whether Judge's overruling counsel's objection amounts to order for trial by special jury — Judge's decision in order to avoid delay — Whether in such circumstances proceedings were mistrial or nullity.

Criminal Law and Procedure — Practice — Joinder of charges — Capital charge should not be coupled with non-capital charges.

This was an appeal against conviction and sentence of the appellant on the offences of abduction and using a firearm with intent to cause physical injury. One of the grounds of appeal was that the jury which tried his case was not summoned according to law. The circumstances in which the jury was summoned were: A few days prior to the trial counsel for the Crown made an oral request to the Sheriff for a special jury to be summoned to try the case. At the trial, after appellant's pleas of not guilty had been recorded, the learned trial Judge directed the jury to be sworn whereupon counsel for the appellant interposed and objected that the Crown had not obtained a Judge's order for a special jury under section 180 of the Criminal Procedure Code. After a brief discussion between the Judge and counsel, the objection was over-ruled and the special jury was empanelled and in due course they returned a verdict of guilty on both charges.

The shorthand note of the proceedings at the trial showed that the learned Judge decided in the way he did, not because he considered it just and reasonable to order a special jury to be summoned to try the case, but because the summoning of a new jury would involve delay and it had not been shown that the appellant would not have a fair trial if he were tried by a special jury.

Held: the special jurors in this case were unqualified because they were not summoned in accordance with the statutory provisions of the Criminal Procedure Code, and therefore, there was a mistrial and the proceedings were a nullity.

Order a *venire de novo.*

Counsel for the appellant referred to the rule of practice in England that a capital charge should not, generally speaking, be coupled with non-capital charges in the same indictment. The reason for this rule is that when an accused person is defending himself on a capital charge, he ought not, in fairness, to be required to defend himself on other additional charges at the same trial.

Held: the English rule of practice has long been established and it is desirable that it should be followed in these Courts.

Case referred to:—

(1) *R. v. Solomon,* (1957) 3 W.L.R. 915; 42 Cr.App.R. 9.

COURT OF CRIMINAL APPEAL.

David Marshall for the appellant.

T. A. Mahony (Crown Counsel) for the respondent.

The judgment of the Court was delivered by —

Whyatt C.J.: — The appellant was convicted at the January Assizes of the offences of abduction and using a firearm with intent to cause physical injury and sentenced to death. He appeals against his conviction and sentence on a number of grounds, in particular, on the ground that the jury which tried his case was not summoned according to law and consequently the proceedings were a mistrial and a nullity.

The circumstances in which the jury was summoned may be briefly stated. A few days prior to the trial, counsel for the Crown made an oral request to the Sheriff — whether by telephone or in person is not clear — for a special jury to be summoned to try this case and in compliance with this request, the Sheriff caused a panel of special jurors to attend in Court on the day of the trial. After the appellant's pleas of not guilty had been recorded, the learned Judge directed the jury to be sworn whereupon counsel for the appellant interposed and objected that the Crown had not obtained a Judge's order for a special jury under section 180 of the Criminal Procedure Code and consequently there was no authority for a special jury to be sworn to try this case. Counsel for the Crown replied that it was not the practice, when a special jury was required to try a case,

to make a formal application to a Judge for an order under section 180 of the Criminal Procedure Code. There followed a brief discussion between the Judge and counsel at the end of which the learned Judge overruled the objection and the special jury was empanelled and in due course returned a verdict of guilty on both charges.

At the hearing of this appeal counsel for the appellant renewed his objection to the procedure adopted in this case for summoning a special jury and it is therefore necessary to consider the effect of section 180 of the Criminal Procedure Code, the provisions of which read as follows:

> "The Public Prosecutor or the accused may apply to any Judge of the High Court for an order requiring a special jury to be summoned to try any case before the Court and the Judge shall, if he considers such application just and reasonable, make such order accordingly."

It is admitted that no formal order was made under this section but it is suggested that the decision of the learned trial Judge overruling the objection of counsel for the appellant should be treated as being in substance, if not in form, an order for the case to be tried by a special jury. The difficulty about accepting this argument is that the section provides that an order shall only be made if the Judge considers the application for a special jury "just and reasonable," but the shorthand note of the proceedings at the trial shows that the learned Judge decided in the way he did, not because he considered it just and reasonable to order a special jury to be summoned to try this particular case, but because the summoning of a new jury would involve delay and it had not been shown that the appellant would not have a fair trial if he were tried by a special jury. It is clear, therefore, that the learned Judge did not proceed on the basis that counsel for the Crown was, in substance, seeking an order under section 180 and it would be the merest fiction if this Court were to treat the decision of the learned Judge in this matter as being equivalent to an order made under that section.

A further argument relied upon by the Crown was that persons qualified as special jurors are also, as a matter of law, qualified as common jurors and therefore if the jury was not properly summoned as a special jury under section 180, it could be treated as being validly summoned as a common jury to which the provisions of section 180 do not apply. It is surprising, to say the least, that the Crown, having asked for a special jury and subsequently maintained in face of objections by the appellant that it was properly summoned as such, should now seek to justify the proceedings at the trial on the ground that it was, after all, a common jury which tried the appellant. The fallacy in this argument is that although a person qualified as a special juror is also qualified as a common juror, a common juror is not necessarily a special juror and if a common jury had been empanelled in the ordinary way in this case, it would have consisted of different jurors.

There is, in our view, no doubt that the jury in this case was not summoned in accordance with the provisions of section 180 of the Criminal Procedure Code and the question we have to determine, therefore, is whether in these circumstances, it can be said there was a trial by jury at all. Valuable guidance on this point is provided by the very recent case of *R. v. Solomon*[1] which was decided by the Court of Criminal Appeal in England in November of last year. The facts of that case were briefly as follows. A doctor was indicted at the Brighton Quarter Sessions for larceny but when he surrendered to stand his trial, it was found that owing to some misunderstanding, the jurors who had been properly summoned and who had attended the previous day, had been discharged. The clerk of the peace then proceeded to pray a tales in the sense that he sent out and collected twelve people and assembled them in the box as a jury. There was no suggestion that they were not as efficient jurors as the persons who had been discharged the day before and counsel for

the prisoner stated he had no objection to the jury as a whole or to the procedure by which they had been summoned. Having been convicted, the prisoner appealed on the ground that he had not been tried by a proper jury and therefore the trial was a nullity. The Court of Criminal Appeal held that the praying of a tales at quarter sessions, as this method of summoning a jury is called, was governed by common law and although some aspects of the law were obscure, this much was certain, that a tales could only be summoned if the jury was composed partly of those who were included in the original panel, that is to say the quales, or to put the matter more simply, a tales could only be prayed to make good a deficiency in the number of jurors and not to make up a full jury. "We feel bound to say," said Lord Goddard, "that the jurors who tried this case were unqualified..... Therefore, it is as if the trial had taken place before no jury at all. We feel bound, therefore, with great reluctance, to set aside the verdict and judgment that were given in this case."

In our view the principle of *R. v. Solomon, supra,* is applicable to the present case. The Court there held that the jurors were unqualified because they had not been summoned in accordance with the common law; similarly in the present case, we hold that the special jurors were unqualified because they were not summoned in accordance with the statutory provisions of the Criminal Procedure Code. Indeed the present case is a stronger case than *Solomon's case* since counsel for the appellant has objected to the procedure throughout, whereas in the English case, counsel who appeared for the prisoner at the trial agreed to the procedure and no objection was taken until the case came before the Court of Criminal Appeal. It follows, therefore, that there was a mistrial in this case and the proceedings are a nullity. We propose, however, to order a *venire de novo* as was done in *R. v. Solomon, supra,* that is to say, we shall order the appellant to be tried on these charges at the next Assizes.

There is one other matter to which we wish to refer before parting with this case. Counsel for the appellant referred to the rule of practice in England that a capital charge should not, generally speaking, be coupled with non-capital charges in the same indictment. The reason for the rule is that when an accused person is defending himself on a capital charge, he ought not, in fairness, to be required to defend himself on other additional charges at the same trial. This rule of practice has long been established in the English Courts and we think it desirable that it should be followed in these courts. We, therefore, express the view that in the further proceedings which we have ordered in this case, the Crown should proceed against the accused separately on each of the two charges.

Accordingly we order that the conviction of the appellant be set aside and annulled, and that the appellant do appear at the next Assizes to be tried on these two charges and that pending such trial, he do remain in custody.

Re-trial ordered.

Solicitors: *David Marshall & Co.*